

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-34850

ROBERT ROY BEAN
a/k/a ROBERT ROY BEAN, JR.
JESSICA ELLEN BEAN

Debtors

**MEMORANDUM ON DEBTORS' MOTION FOR ORDER
AUTHORIZING DEBTOR-IN-POSSESSION TO USE CASH COLLATERAL
AND MOTION FOR RELIEF FROM AUTOMATIC STAY,
AND TO PROHIBIT USE OF CASH COLLATERAL**

APPEARANCES: MILLER & ASSOCIATES, PLLC
Mary D. Miller, Esq.
3508B Maryville Pike
Knoxville, Tennessee 37920
Attorneys for Community Bank of Loudon County

JENKINS & JENKINS ATTYS., PLLC
Michael H. Fitzpatrick, Esq.
2121 First Tennessee Plaza
800 South Gay Street
Knoxville, Tennessee 37929-2121
Attorneys for Debtors

RICHARD F. CLIPPARD, ESQ.
UNITED STATES TRUSTEE
Patricia C. Foster, Esq.
Howard H. Baker, Jr. United States Courthouse
800 Market Street
Suite 114
Knoxville, Tennessee 37902
Attorneys for United States Trustee

**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

The following contested matters are presently before the court: (1) the final hearing on the Debtor's [sic] Motion for Order Authorizing Debtor-in-Possession to Use Cash Collateral and for Emergency Hearing (Motion for Cash Collateral) filed by the Debtors on October 25, 2004; and (2) the Motion for Relief From the Automatic Stay, and to Prohibit Use of Cash Collateral (Motion for Relief) filed by Community Bank of Loudon County, a Greene County Bank Office (Community Bank), on January 12, 2005, requesting relief from the automatic stay so that it may foreclose upon its collateral, or in the alternative, that the court enter an order directing the Debtors to cease using Community Bank's cash collateral. The Debtors oppose the Motion for Relief, arguing that cause does not exist to grant the request for relief from the stay, and requesting that the court set a final amount for adequate protection payments.

The trial on both Motions was held on February 1, 2005. The record before the court consists of Stipulations filed by the parties on January 25, 2005, fifty-one exhibits introduced into evidence, and the testimony of nine witnesses: Rob Strickland, Vice President of Real Estate for Furrow Auction Company, Julia Frazier, Manager of Loan and Credit Services for Community Bank, Danny Crabtree, Manager of Special Assets and Collections Department of Community Bank, Kent Vaught, President and Chief Operating Officer of Greene County Bank, Steve Droke, Senior Vice President of Greene County Bank, two appraisers, Jeff Fletcher and Kenneth Woodford, and the Debtors.

This is a core proceeding. 28 U.S.C.A. § 157(b)(G), (M) (West 1993).

I

On March 18, 2002, the Debtors, in their respective capacities as President and Secretary of Magic Spray Car Wash, Inc., executed a promissory note (Note) with Community Bank in the principal

amount of \$700,000.00. The Note is secured by real property owned by the Debtors consisting of a 1.32 acre tract located at 5504 Central Avenue Pike, Knoxville, Tennessee (Car Wash Property). *See* TRIAL EX. 1. The Debtors use the Car Wash Property to operate a car wash facility known as Magic Spray Car Wash (Magic Spray).¹ In addition to the Car Wash Property, the Note is secured by all rents and leases related to Magic Spray and Magic Spray's equipment, machinery, tools, furniture, and fixtures.² The Debtors also each executed a written Guaranty guaranteeing payment of the Note. Under the terms of the Note, the Debtors were required to make monthly payments of \$6,534.05 to Community Bank.

At the time the Note was executed, Magic Spray consisted of four self-service bays and one automatic drive-thru bay. In early 2002, the Debtors began expanding Magic Spray to include another self-service bay as well as another automatic bay. They experienced difficulties with their contractor, who eventually left the job in June 2002, and the Debtors completed the expansion work themselves. Additionally, Magic Spray was vandalized on several occasions.³ Due to these difficulties, as well as a drop in customers because of the heavy rains occurring in Fall 2002, the Debtors fell behind on their obligations to Community Bank.

Discussions were held between the Debtors and Community Bank officials in late 2002 and early 2003. At these various meetings, the Debtors informed Community Bank that an arcade

¹ Magic Spray is operated through a corporation, Magic Spray Car Wash, Inc. The Debtors own 100% of the stock in the corporation, which leases the Car Wash Property from the Debtors. Magic Spray consists of five self-service car wash bays and two automatic, drive-thru, brushless bays, all with heated floors, three vacuum stations, and a vending machine area.

² The equipment, machinery, tools, furniture, and fixtures belong to Magic Spray and are not property of the estate at issue in this contested matter.

³ Mrs. Bean testified that since they opened Magic Spray in 1999, it had been vandalized at least ten times. Vandalism to one of the self-service bays and one of the automatic bays in October 2003 caused both to be out of service for approximately two weeks.

business they had been operating had closed, and they offered the arcade games and pool tables as additional collateral. Alternatively, the Debtors offered to sell some of the arcade assets and pay Community Bank with the proceeds. Instead, however, on March 31, 2003, the Debtors and Community Bank entered into a Modification of Promissory Note and Deed of Trust Adding Additional Collateral (Modification), whereby the principal amount of the Note was increased to \$733,532.86 so that the Debtors could receive additional funds to bring their account with Community Bank current. *See* TRIAL EX. 6. In exchange, the Debtors pledged as additional collateral an undeveloped 6.35-acre parcel of real property adjacent to their residence (6.35 Acres). The Modification provided for an increase in the Debtors' monthly payments to Community Bank to \$7,200.00.⁴

Once again, the Debtors experienced financial difficulties, and they defaulted under the terms of the Note and Modification, making their last payment thereunder in September 2003. Following more discussions and negotiations, Community Bank offered the Debtors a forbearance agreement that was never executed. Thereafter, Community Bank made three demands on the Debtors, both individually and through counsel.⁵ *See* COLL. TRIAL EX. 60. After receiving no offer from the Debtors, Community Bank exercised its legal remedies under the security documents securing the Note and Modification by instituting foreclosure proceedings against the Car Wash Property. The foreclosure did not occur, however, due to the filing of the Debtors' Voluntary Petition commencing

⁴ The court acknowledges that there is a dispute concerning Community Bank's purported agreement to release its lien against the 6.35 Acres that is the subject of a lawsuit filed in the United States District Court. For that reason, Community Bank does seek relief from the stay as to this tract notwithstanding that its value must be factored into the equity equation mandated by 11 U.S.C.A. § 362(d)(2)(A). The court finds the value of the 6.35 Acres to be that testified to by Jeff Fletcher, Community Bank's appraiser, \$50,000.00. The Debtors offered no proof to the contrary.

⁵ The Debtors were represented by three different attorneys concerning this matter and other disputes with Community Bank regarding liens against their house and the 6.35 Acres. The first two withdrew due to conflicts of interest. The Debtors then hired a third attorney, who negotiated a partial release, whereby Community Bank released a lien against the Debtors' residence. *See* TRIAL EX. 65.

their case under Chapter 11 of the Bankruptcy Code on September 14, 2004. Since that date, the Debtors have continued operating Magic Spray.

On October 25, 2004, the Debtors filed the Motion for Cash Collateral, whereby they sought to use the rents pledged to Community Bank as cash collateral for the continued operations of Magic Spray. Community Bank filed its Objection to Debtors' Motion for Order Authorizing Debtor-in-Possession to Use Cash Collateral and Motion to Prohibit Use of Cash Collateral and Require Debtor to Provide Adequate Protection on November 15, 2004, opposing the Debtors' use of its cash collateral and asking the court to direct the Debtors to make adequate protection payments. Following a hearing, the Preliminary Order for Use of Cash Collateral and Adequate Protection (Preliminary Cash Collateral Order) was entered on December 27, 2004, authorizing the Debtors to use a limited amount of cash collateral for ordinary business and living expenses, not to exceed 10% of the Debtors' Schedule I budget, and granting Community Bank a post-petition lien on all of the Debtors' post-petition property. Additionally, the Preliminary Cash Collateral Order provided that the Debtors would make adequate protection payments to Community Bank in the amount of \$1,000.00 on or before December 1, 2004, December 15, 2004, January 1, 2005, and January 15, 2005, to be applied to the principal balance owed to Community Bank. There is no dispute that the Debtors made these adequate protection payments.

Community Bank filed a proof of claim on December 13, 2004, which it amended on January 18, 2005, asserting a claim in the amount of \$800,128.46, plus interest, expenses, and attorneys fees. *See* TRIAL EX. 8; TRIAL EX. 9. As of January 31, 2005, the total indebtedness owed by the Debtors to Community Bank pursuant to the Note and Modification was \$829,557.86, consisting of principal in the amount of \$719,311.48, interest in the amount of \$77,812.08, late charges in the amount of

\$1,250.00, and other expenses such as attorneys fees, collection costs, and returned check fees totaling \$31,184.30.

Community Bank then filed the Motion for Relief presently before the court, arguing that it is entitled to stay relief because it is not adequately protected. Additionally, Community Bank avers that there is cause for relief from the stay because the Debtors have not filed a plan of reorganization or an application to employ a realtor, and, since their October 2003 payment and except for the \$4,000.00 required by the Preliminary Cash Collateral Order, they have made no payments to Community Bank on the Note and Modification. Community Bank also argues that it is entitled to relief from the automatic stay because the Debtors have been unable to generate sufficient monthly income through their “single-asset real estate” bankruptcy estate to even service the monthly payment owed to Community Bank on the Note and Modification. Finally, Community Bank seeks relief on the basis that there is no equity in the Car Wash Property, and it is not necessary for a successful reorganization because the Debtors cannot successfully reorganize.⁶

In response, the Debtors aver that the Car Wash Property is not depreciating and that Community Bank’s collateral is protected by virtue of adequate protection payments. Additionally, the Debtors argue that cause does not exist for granting relief from the automatic stay due to any improper conduct on their behalf. The Debtors also aver that the Car Wash Property has equity and is necessary for an effective reorganization, which the Debtors believe can be accomplished through the sale of their assets in the open market. The Debtors also dispute Community Bank’s assertion

⁶ At trial, the parties reiterated that Community Bank seeks relief from the automatic stay only with respect to the Car Wash Property and not to the 6.35 Acres. *See supra* n.4.

that their case is a “single asset real estate” case as that term is defined at 11 U.S.C.A. § 101(51B) (West 2004).

II

Requests for relief from the automatic stay are governed by 11 U.S.C.A. § 362(d), which provides, in material part:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period)—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate . . . which payments are in an amount equal to interest at a current fair market rate on the value of the creditor’s interest in the real estate.

11 U.S.C.A. § 362(d) (West 2004). The automatic stay provides debtors with “an opportunity to protect [their] assets for a period of time so that [their] resources might be marshaled to satisfy outstanding obligations.” *Laguna Assocs. Ltd. P’ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd.*

P'ship), 30 F.3d 734, 737 (6th Cir. 1994) (citing, among others, *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir. 1985) (“The purpose of a Chapter 11 reorganization is to assist financially distressed business enterprises by providing them with breathing space in which to return to a viable state.”)).

Community Bank will be entitled to relief from the automatic stay under § 362(d)(2) if there is no equity in its collateral, and the collateral is not necessary for an effective reorganization. *See* 11 U.S.C.A. § 362(d)(2). Under this subsection, Community Bank bears the burden of establishing that there is no equity in the Car Wash Property, and if it meets this burden, the Debtors must prove that they can effectively reorganize and that they need the Car Wash Property to do so. *See* 11 U.S.C.A. § 362(g). On the other hand, if Community Bank does not meet its burden of establishing the lack of equity, the inquiry ends, and relief will not be granted. *See Sumitomo Trust & Banking Co. v. Holly's Inc. (In re Holly's Inc.)*, 140 B.R. 643, 697 (Bankr. W.D. Mich. 1992) (“Because § 362(d)(2) is drafted in the conjunctive, both prongs must be satisfied to grant relief from the stay.”).

Equity has been defined as “the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors.” *Holly's, Inc.*, 140 B.R. at 697 (quoting *Stephens Indus., Inc. v. McClung*, 789 F.2d 386, 392 (6th Cir. 1986)). In support of its request and its argument that there is no equity in the Car Wash Property, Community Bank first introduced into evidence the testimony of Rob Strickland, who had prepared a proposal for the Debtors concerning the auction value of the Car Wash Property.⁷ *See* TRIAL EX. 54. Mr. Strickland testified that he went to the Car Wash Property, met with the Debtors, gathered information, and, collectively with his colleagues at Furrow Auction, prepared the proposal to auction the property.

⁷ The parties stipulated that Mr. Strickland qualified as an expert in the area of real estate and equipment auctions.

Based upon his experience and the information he gathered, Mr. Strickland opined that the Car Wash Property would bring between \$200,000.00 and \$250,000.00 at an auction. This figure was based upon a thirty to ninety day advertised, non-negotiated, auction for cash. In assigning an auction value, Mr. Strickland did not investigate Magic Spray's cash flow history or its average gross or net profits.

In further support of its argument, Community Bank next introduced into evidence the testimony of Jeff Fletcher, along with the Market Value Appraisal Summary Report dated September 14, 2004 (Appraisal Report) he prepared.⁸ See TRIAL EX. 18. In his appraisal, Mr. Fletcher assigned the Car Wash Property a value of \$485,000.00, which is significantly less than Community Bank's claim, and supports Community Bank's assertion that there is no equity in the Car Wash Property. As is customary, Mr. Fletcher arrived at the final \$485,000.00 value after accessing the value utilizing the Sales Comparison Approach, the Cost Approach, and the Income Approach. At trial, he explained how he arrived at his values under each approach and the factors that he considered in making his determinations.

Using the Sales Comparison Approach, Mr. Fletcher assigned the Car Wash Property a value of \$500,000.00. To arrive at this value, Mr. Fletcher compared the Car Wash Property to three other car wash properties in Knox County, making adjustments for location, access, visibility, size, shape, and topography.⁹ Although he originally tried to isolate his comparables to the most similar properties, Mr. Fletcher stated that he found no other properties in the area with both self-service bays

⁸ The parties stipulated that Mr. Fletcher qualified as an expert witness in the area of real estate appraisals.

⁹ When questioned by the Debtors as to how he arrived at his adjustments, Mr. Fletcher testified that they were based upon his experience and judgment.

and automatic bays. Therefore, his comparisons include three facilities with six self-service bays, which are, according to Mr. Fletcher, inferior properties to the Car Wash Property.

Using the Cost Approach, Mr. Fletcher assigned the Car Wash Property a value of \$510,000.00. For this analysis, he compared recent sales of three unimproved commercial properties in the Knox County area, made adjustments for location, accessibility, visibility, size, and topography, and arrived at a price per bay of \$42,000.00.¹⁰ The construction costs of the improvements to the Car Wash Property used by Mr. Fletcher were attained by using a computer program developed by the Marshall Valuation Service, which included engineering fees, contractor's fees, taxes, interest, utilities, and normal site preparation.¹¹ He could not recall if he had ever received the actual construction or equipment costs incurred by the Debtors.

Finally, using the Income Approach, Mr. Fletcher arrived at a direct capitalization value of \$465,000.00 and a gross income multiplier value of \$470,000.00. Both figures are based upon tax and financial documentation that Mr. Fletcher received from the Debtors and Magic Spray's accountants. He testified that he relied most heavily upon the financial figures from 2000 and 2001 in his analysis, as they appeared to be Magic Spray's most stable years. Using Magic Spray's adjusted net operating income for those years, Mr. Fletcher arrived at an estimated net operating income of \$56,650.00.¹² He then used a capitalization rate of 12.5% to arrive at a direct capitalization value of \$465,000.00.

¹⁰ The mean value of the comparables, after adjustments, was \$173,465.00, which Mr. Fletcher rounded up to \$175,000.00, resulting in a price per square foot for the 1.32 acre tract of \$3.00. Again, Mr. Fletcher testified that these properties were inferior to the Car Wash Property.

¹¹ The *Marshall Valuation Service Manual* is widely accepted within the appraisal industry as the primary cost publication for use in making an analysis using the Cost Approach. Mr. Fletcher testified that the computer program simply incorporates the information from the manual and provides an easier method for calculating costs.

¹² With respect to the income earned by Magic Spray, Mr. Fletcher deduced that its biggest impediment was the number of competitive properties in the same general area.

With respect to the gross multiplier value, Mr. Fletcher multiplied \$189,500.00, Magic Spray's average gross income for 2000 and 2001, by a "multiplier" derived by dividing a property's gross price by the gross sales. Mr. Fletcher found that the average multiplier for the three self-service car wash facilities he analyzed was 2.48,¹³ which resulted in the final value of \$470,000.00. The average of the values of his various approaches resulted in his final rounded valuation of \$485,000.00.¹⁴

The Debtors disputed Mr. Fletcher's Income analysis, pointing out that even though he testified to having found the historical information received from Magic Spray's accountants to be conflicting, he did not include any industry trade information in his analysis. In response, Mr. Fletcher explained, to the court's satisfaction, that when he has actual historical data available, he does not use industry information, basically under the assumption that information provided to the Internal Revenue Service on tax returns is accurate and reliable. Moreover, although Mr. Fletcher stated that the financial information he received was somewhat conflicting, the court notes that the numbers contained in Mr. Fletcher's Income Approach analysis for 2001 and 2002 exactly match the numbers contained in the tax returns for those years filed by Magic Spray with the exception of the rents, which Mr. Fletcher testified he attributed as management expenses. *See* TRIAL EX. 39; TRIAL EX. 40. Because the Debtors testified that these tax returns accurately reflect the financial condition of Magic Spray for 2000 and 2001, the court agrees that they better reflect the actual income of Magic Spray than would industry averages.

¹³ Mr. Fletcher obtained the information concerning gross sales and sales prices for recent sales from the BIZCOMPS® studies, which "contain detailed information on 7,645 transactions from 1990 through November 2003 obtained from business brokers and transaction intermediaries." TRIAL EX. 18, at 51.

¹⁴ In his Appraisal Report, Mr. Fletcher also includes the property tax value. At trial, the Debtors objected to the introduction of the tax value as evidence, which was sustained by the court. *See In re Northern*, 294 B.R. 821, 828 n.9 (Bankr. E.D. Tenn. 2003) (stating that tax appraisals are not considered credible evidence as to the value of real property). According, the court is not considering the tax valuation contained in Mr. Fletcher's Appraisal Report. Nevertheless, even taking the tax value out of the equation, the average of the considered values is \$486,250.00.

To rebut Mr. Fletcher's valuations, the Debtors offered into evidence the testimony of Kenneth Woodford, along with his July 10, 2001 appraisal report finding that the Car Wash Property was worth \$1,000,000.00.¹⁵ See TRIAL EX. 55. Broken down, Mr. Woodford assigned values of \$845,000.00 under the Cost Approach, \$1,025,000.00 utilizing the Sales Comparison Approach, and \$1,130,000.00 using the Income Approach. In making his determination, Mr. Woodford employed the same basic methodology as Mr. Fletcher. In addition, Mr. Woodford consulted with Magic Wand Car Wash Systems, located in Bristol, Virginia, who is the supplier of Magic Spray's equipment and chemicals, concerning industry standards.

With respect to the Income Approach, which yielded the highest value, Mr. Woodford based Magic Spray's anticipated income on the Debtors' figures for April 2000 through April 2001, which were adjusted to include estimated amounts for the two additional bays that the Debtors were adding. He then obtained the average industry income from Magic Wand Car Systems and arrived at a proposed annual gross income for Magic Spray of \$293,645.00. Following a deduction for expenses, that amount was then multiplied by a 15% capitalization rate and rounded to \$1,130,000.00. At trial, however, when presented with the actual gross receipts earned by Magic Spray for 2001, 2002, and 2003, as evidenced on its tax returns introduced into evidence as Trial Exhibits 39, 40, and 41, respectively, Mr. Woodford stated that his valuation would be significantly less than the \$1,130,000.00 figure given in July 2001.

With respect to his Sales Comparison Approach, the Car Wash Property was measured against two other car washes, the first located in Cumming, Georgia, and the second in Franklin, Tennessee.

¹⁵ As with Mr. Fletcher, the parties stipulated that Mr. Woodford was an expert witness concerning his appraisal of the Car Wash Property.

Mr. Woodford testified that he chose these two sales because they were similar operations to Magic Spray and roughly the same size.¹⁶ Based upon his estimated potential gross profit, multiplied by a gross income multiplier of 3.5, Mr. Woodford arrived at his valuation of \$1,025,000.00; however, once again, because Magic Spray's actual gross income was substantially less than the potential gross income, Mr. Woodford's valuation was skewed.

Finally, Mr. Woodford examined the land sales of nine other properties in the Central Avenue Pike area to arrive at the raw land portion of his Cost Approach valuation. Mr. Woodford also used Marshall Valuation Service and arrived at a price per square foot for self-service car washes and drive-thru car washes. After adjusting for location and timeliness, and including the actual equipment costs obtained from Magic Wand Car Systems and the Debtors, Mr. Woodford determined the value of the improvements. This value, however, did not include any costs for depreciation. Mr. Woodford determined that the total value of the land and improvements was approximately \$734,500.00, to which he added in a 15% developer profit, arriving at the final estimated value of \$845,000.00.

The primary problems, however, with Mr. Woodford's appraisal of the Car Wash Property are its age and the data upon which his valuations are based. The appraisal was made in July 2001, prior to the expansion, although he references the plans for expansion and takes it into consideration in making his valuations. Also, at the time of Mr. Woodford's appraisal, the Debtors had not yet experienced any of the financial difficulties that occurred shortly thereafter. Finally, once presented with the actual gross income for 2001 through 2003, Mr. Woodford testified that his valuations would decrease significantly. Based upon this testimony, together with the valuations assigned by Mr.

¹⁶ He also testified that the two comparables averaged gross sales of approximately \$700,000.00, which he conceded were substantially higher than Magic Spray's gross sales of \$186,232.00 in 2001, \$154,091.00 in 2002, and \$167,441.00 in 2003. See TRIAL EX. 39; TRIAL EX. 40, TRIAL EX. 41.

Fletcher, and the auction proposal prepared by Mr. Strickland, the court finds that the general values determined by Mr. Fletcher best reflect the true value of the Car Wash Property. Therefore, because Community Bank's claim of \$800,128.46 at the commencement of the Debtors' case exceeds \$560,000.00, which is the highest value of the Car Wash Property determined by Mr. Fletcher using the Cost Approach (\$510,000.00), plus the value of the 6.35 Acres (\$50,000.00),¹⁷ there is no equity in the Car Wash Property, and the burden shifts to the Debtors.

To satisfy § 362(d)(2)(B), the Debtors must establish that they are attempting to effectuate a successful reorganization, within a reasonable time, and that the collateral is necessary therefor. *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 108 S. Ct. 626, 633 (1988). Moreover, the Debtors must provide more than just an assertion that reorganization is impossible without the collateral. *In re St. Peter's Sch.*, 16 B.R. 404, 408 (Bankr. S.D.N.Y. 1982). At a minimum, they must make a showing that:

- (1) [they are] moving meaningfully to propose a plan of reorganization. The older or simpler a case or "iffier" the business is, the stronger that showing must be.
- (2) The proposed or contemplated plan has a realistic chance of being confirmed . . . and must provide that
 - (a) The lender's allowed secured claim can be realistically valued and paid over time . . . from the debtor's net operating income generated by the property; or
 - (b) Some other means of proposing a confirmable plan are realistically contemplated. These may include new capital contributions, sale to a third party or other options sanctioned by the Bankruptcy Code.
- (3) The proposed or contemplated plan is not patently unconfirmable.

¹⁷ See *supra* n.4.

In re Ashgrove Apts. of DeKalb County, Ltd., 121 B.R. 752, 756-57 (Bankr. S.D. Ohio 1990); *see also* *Creekstone Apts. Assocs., L.P. v. Resolution Trust Corp. (In re Creekstone Apts. Assocs., L.P.)*, 168 B.R. 639, 642 (Bankr. M.D. Tenn. 1994); *In re Snapwoods Apts. of DeKalb County, Ltd.*, 153 B.R. 524, 526 (Bankr. S.D. Ohio 1993). A plan may be “somewhat obscure or vague as long as it is plausible that a successful reorganization may occur.” *Holly’s Inc.*, 140 B.R. at 701. In other words, “[a]n effective reorganization must be one that is *in prospect*.” *Viper Mining Co. v. Diversified Energy Venture (In re Diversified Energy Venture)*, 311 B.R. 712, 719 (Bankr. W.D. Pa. 2004) (citing *Timbers of Inwood Forest Assocs.*, 108 S. Ct. at 633).

The Debtors argue that they should be entitled to liquidate their property, including the Car Wash Property, thereby consummating an “effective reorganization.” At trial, the Debtors offered the following summary of their plans to reorganize. First, they have filed an application to employ a realtor for six months in order to market and sell the Car Wash Property, along with their home and the 6.35 Acres collectively. In the meantime, the Debtors propose to pay adequate protection payments of \$3,000.00 per month to Community Bank. In the event that the Car Wash Property has not sold within the initial six months, Community Bank will automatically be granted relief from the automatic stay. In addition, the Debtors anticipate selling their arcade games and using any proceeds received to pay their unsecured creditors, along with any proceeds netted from the Debtors’ lawsuit versus Community Bank in the United States District Court. Next, both of the Debtors testified to working on their respective resumes and entering the workforce in mid-February. Finally, the Debtors each testified that they plan to move to Nashville.¹⁸

¹⁸ Although it does not expressly affect the Debtors’ reorganizational plans, the court also notes that the Debtors operate the Tennessee Nature Center, a non-profit organization run by the Debtors, through which they care for exotic cats. Mrs. Bean testified that after obtaining the proper permits, this organization would move with the Debtors to Nashville.

The court is not convinced that the Debtors can effectuate a successful liquidation of their properties within a reasonable time.¹⁹ In fact, after examining the Debtors' financial information, the court questions their ability to service even the proposed \$3,000.00 adequate protection payments to Community Bank. Community Bank introduced into evidence the Debtors' reconciliation reports for Magic Spray for the period of October 2003 to September 2004. *See* TRIAL EX. 27 through TRIAL EX. 38. Of those reports, only six evidence an ending account balance greater than \$3,000.00. *See* TRIAL EX. 27; TRIAL EX. 28; TRIAL EX. 32; TRIAL EX. 33; TRIAL EX. 37; TRIAL EX. 38. Additionally, these reports reflect a time period in which the Debtors were not making any payments to Community Bank on the Note and Modification, and out of those six reports, only three reflect balances greater than the \$7,200.00 monthly payment required under the Modification. *See* TRIAL EX. 27; TRIAL EX. 37; TRIAL EX. 38. Furthermore, in each of those months, the Debtors received some sort of "windfall," including an equity loan from their Nashville house, *see* TRIAL EX. 27, and a loan from Roy Case, *see* TRIAL EX. 37; TRIAL EX. 38. Additionally, the Debtors' monthly operating reports for September through December 2004 evidence that their gross income from operating Magic Spray was \$10,287.24, which comes to an average per month of approximately \$2,500.00, and the net income for this same period was \$7,074.13, resulting in an average net income of less than \$1,800.00 per month.²⁰ *See* TRIAL EX. 23; TRIAL EX. 24; TRIAL EX. 25; TRIAL EX. 26.

Finally, throughout their dealings with Community Bank, the Debtors have consistently made promises and proposals to sell their house, the 6.35 Acres, or the arcade equipment, none of which

¹⁹ As an initial matter, the Debtors did not file a plan of reorganization, and their exclusivity period expired on January 12, 2005.

²⁰ At trial, Mr. Bean also testified to receiving a \$10,000.00 loan from his cousin in October 2004 to pay his attorneys for the lawsuit against Community Bank in the United States District Court. The court does not consider this loan in its calculations of the Debtors' or Magic Spray's gross and net income.

have ever come to fruition. With respect to the house and the 6.35 Acres, Mr. Bean testified that the Debtors had listed the properties jointly for sale from March or April 2004 through December 2004, for a purchase price of \$741,00.00; however, throughout that entire time, only three to five persons looked at the properties.²¹ With respect to the arcade equipment, Mrs. Bean testified that they had sold a pool table for \$2,600.00 in January 2004; however, Mr. Bean testified that he did not want to sell the remaining pool tables, but instead, he only wanted to sell the arcade games. To that end, Mr. Bean recently ran ads in the Bargain Mart newspaper, advertising the arcade games for sale, but he also testified that he did not run them every week. Furthermore, the ads have been unsuccessful, because Mr. Bean stated that he has not sold any of the arcade games since the commencement of the Debtors' Chapter 11 case, and neither of the Debtors could specifically recall selling any of the arcade equipment or pool tables since January 2004.

The Debtors also testified that they were working on their resumes and hoping to enter the workforce; however, neither offered any prospective jobs or careers that were being explored. In fact, other than their statements that they hoped to have their resumes finished by February 15, 2005, and Mrs. Bean's testimony that she has a Bachelor of Science degree in Horticulture and Landscape Design, the Debtors offered absolutely no evidence concerning any prospective employment.

Although the Debtors obviously have good intentions, they have not shown any initiative to back up their proposed plans, and "[u]nrealistic hypotheticals such as these are the precise reason why the statute requires that the property be necessary to an effective reorganization." *In re New Era Co.*, 125 B.R. 725, 730 (S.D.N.Y. 1991). The plain fact of the matter is that Magic Spray does not

²¹ When asked how he came up with the purchase price, Mr. Bean testified that their real estate agent, Dick Bales, set the price. Mr. Bales is also the agent that the Debtors currently wish to employ to liquidate the Car Wash Property, the house, and the 6.35 Acres.

produce adequate income to even ensure payment of the proposed \$3,000.00 adequate protection payments to Community Bank. Additionally, the Debtors have consistently offered to sell their arcade equipment but have only half-heartedly attempted to do so. Moreover, the Debtors offered no proof as to the actual value of this equipment, even though they scheduled the value in excess of \$100,000.00 in their bankruptcy schedules. Similarly, the Debtors have filed a lawsuit against Community Bank in the United States District Court over purported fraud by the bank, and they plan to use any proceeds realized from this lawsuit as payment to their unsecured creditors. This notwithstanding, there is no evidence in the record as to the likelihood of their success in this lawsuit, nor is there anything in the record to indicate the value thereof.

Finally, the Debtors seek to sell the Car Wash Property, as well as their house collectively with the adjoining 6.35 Acres. They did not, however, offer any evidence to convince the court that they are in a better position to sell the Car Wash Property than is Community Bank if granted relief from the automatic stay. The court can only presume that the Debtors intend to continue operations of Magic Spray until such time as the Car Wash Property sold, but this was not made clear, especially in light of the Debtors' testimony that they were attempting to go into the workforce and move to Nashville. Nevertheless, based upon the evidence, the court finds that the Debtors have not met their burden of proof with respect to § 362(d)(2)(B). It therefore agrees with Community Bank that the Debtors do not have the ability to effectively reorganize within a reasonable time, and therefore, relief from the automatic stay pursuant to § 362(d)(2) is proper.²²

²² Because the evidence supports granting relief from the stay under § 362(d)(2), it is not necessary for the court to address Community Bank's "single asset real estate" argument or its arguments that it is entitled to relief under § 362(d)(1) and/or (d)(3) nor is it necessary to address cash collateral issues.

An order consistent with this Memorandum will be entered.

FILED: February 11, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-34850

ROBERT ROY BEAN
a/k/a ROBERT ROY BEAN, JR.
JESSICA ELLEN BEAN

Debtors

ORDER

For the reasons set forth in the Memorandum on Debtors' Motion for Order Authorizing Debtor-in-Possession to Use Cash Collateral and Motion for Relief From Automatic Stay, and to Prohibit Use of Cash Collateral filed this date, the court directs the following:

1. The Motion for Relief From the Automatic Stay, and to Prohibit Use of Cash Collateral filed by Community Bank of Loudon County, a Greene County Bank Office, on January 12, 2005, is GRANTED.

2. The automatic stay of 11 U.S.C.A. § 362(a) (West 2004) is modified to allow Community Bank of Loudon County, a Greene County Bank Office, to foreclose its lien encumbering the Debtors' real property located at 5504 Central Avenue Pike, Knoxville, Tennessee, with such foreclosure to be in accordance with the laws of the State of Tennessee and the Real Estate Deed of Trust executed by the Debtors on March 18, 2002, in favor of Kenneth Clark Hood, Trustee, of record in the Office of the Register of Deeds for Knox County, Tennessee, being Instrument No. 200203210077832.

SO ORDERED.

ENTER: February 11, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE